ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1066

EAGLE BROADCASTING GROUP, LTD.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties:

All parties, intervenors, and amici appearing below and in this Court are listed in the Initial Brief of Appellant Eagle Broadcasting Group, LTD.

B. Rulings Under Appeal:

Eagle Broadcasting Group, Ltd, Memorandum Opinion and Order, 23 FCC Rcd 588 (2008) (JA 1)

C. Related Cases:

The agency order on review has not previously been before this Court or any other court. Counsel are not aware of any other related cases before this or any other court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Statutes and Regulations

Others

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Commission or FCC	Federal Communications Commission
Commission's Order	*Eagle Broadcasting Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588 (2008) (JA 1)
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*
Eagle	Appellant Eagle Broadcasting Group, Ltd.
FAA	Federal Aviation Administration
STA	Special Temporary Authorization
Staff Decision	*February 17, 2004 Letter from Peter H. Doyle* (JA 130)

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ISSUES PRESENTED

Section 301 of the Communications Act prohibits all broadcasting except as authorized by a Federal Communications Commission license. 47 U.S.C. § 301. Section 303(q) directs the Commission to exercise its licensing authority to ensure that broadcast towers do not constitute "a menace to air navigation," *id.* § 303(q), and the Commission has done so by, among other things, requiring Federal Aviation Administration clearance for towers that could threaten aviation safety, *see* 47 C.F.R. § 17.1, *et. seq.* Finally, Section 312(g) of the Communications Act specifies that a broadcast license "expires" if a "broadcasting station fails to

transmit broadcast signals for any consecutive 12-month period." 47 U.S.C. § 312(g).

The issues presented are:

Did the Commission reasonably read these provisions in tandem to mean that a licensee that fails to broadcast at all for eleven months cannot avoid the automatic license expiration mandated in Section 312(g) by starting to broadcast from an unauthorized location in violation of Section 301 and without required FAA safety clearance?

Did the Commission properly decline to exercise its discretion to reinstate the expired license in light of the licensee's repeated false statements to the Commission regarding issues of aviation safety?

STATUTES AND REGULATIONS

Pertinent statutory provisions and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. Broadcast Licensing

Section 301 of the Communications Act provides that "[n]o person shall" transmit radio broadcast signals "except under and in accordance with this Act and with a license" "granted under the provisions of this Act." 47 U.S.C. § 301. This Court has noted that the government "has a substantial interest in ensuring compliance with the Communications Act and in particular with its central

requirement of a license to broadcast." *Ruggiero v. FCC*, 317 F.3d 239, 245 (D.C. Cir. 2003).

The Communications Act defines "broadcasting" as the "dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(6). Broadcast stations are required to operate pursuant to minimum operating schedules. 47 C.F.R. § 73.1740. A station that is not "broadcasting" is commonly referred to as "silent" (or "dark"). Prior to amendment of the Communications Act by the Telecommunications Act of 1996,[1] the FCC generally dealt with silent stations in one of two ways. The FCC either would grant authority for the station to remain silent for a specified period of time if it found that such authority would serve the public interest; or the FCC would initiate a proceeding to revoke or cancel the station's license. *Implementation of Section 403(l) of the Telecommunications Act of 1996,* 11 FCC Rcd 16599 (¶ 2) (1996) ("*Silent Station Authorizations*").

The Telecommunications Act of 1996, however, added a new subpart – (g) – to Section 312 of the Communications Act, which expressly stated that "[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary." 47 U.S.C. § 312(g) (1996). As originally enacted, the new provision made termination automatic; by cancelling the license it

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[1] Pub. L. No. 104-104, 110 Stat. 56 (enacted Feb. 8, 1996).

put an end to any discretion or obligation the FCC had to consider whether a licensed broadcast station should be permitted to remain silent for periods greater than 12 consecutive months. It also removed any requirement that the FCC initiate revocation proceedings to terminate such licenses. *See Silent Station Authorizations*, 11 FCC Rcd at 16600 (¶ 3). At the same time, Section 312(g) had no effect on FCC rules requiring Commission consent for lesser periods of silence or on the FCC's authority to terminate licenses under existing revocation and cancellation procedures.[2]

Eight years later, Congress amended Section 312(g) by adding language giving the Commission discretion under certain circumstances to extend or reinstate a station license that had expired due to silence for 12 consecutive months.[3] Accordingly, as amended, Section 312(g) provides:

> If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.

47 U.S.C. § 312(g).

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[2] *See, e.g.,* 47 C.F.R. § 73.1740, which requires an FM station licensee to obtain the FCC's approval for discontinued operations of 30 or more consecutive days.

[3] Section 312(g) was amended by the Satellite Home Viewer Extension and Reauthorization Act of 2004, which was enacted as a part of the Consolidated Appropriations Act, 2005. *See* Pub. L. No. 108-447, Div. J., Tit. IX, 118 Stat. 2809, 3431.

B. Aviation Safety

Section 303(q) of the Communications Act directs the Commission to mandate broadcast tower safety features such as "painting and/or illumination" when "there is a reasonable possibility" that a tower "may constitute . . . a menace to air navigation." 47 U.S.C. § 303(q). Under the Commission's rules, an applicant that proposes to construct a broadcast antenna "that may interfere with the approach or departure space of a nearby airport runway" must notify the Federal Aviation Administration of the proposed construction and must receive a written response from the FAA in which the FAA determines whether the antenna is a potential hazard and, if constructed, will be required to have certain painting and lighting characteristics in order to prevent collisions with air traffic. *Eagle Broadcasting Group, Ltd.,* Memorandum Opinion and Order, 23 FCC Rcd 588, 589 n.11 (2008) (JA 2-3) ("*Commission's Order*"); *see generally* Part 17—Construction, Marking, and Lighting of Antenna Structures, 47 C.F.R. § 17.1, *et. seq*. Licensees must register all towers requiring FAA notification with the Commission. *See* 47 C.F.R. § 17.4. A licensee can easily determine whether a proposed antenna requires FAA review and Commission registration by entering its height, other specifications, and location into the Commission's TOWAIR system, which is available for free on the Internet. *See Commission's Order* n.36 (JA 7); http://wireless2.fcc.gov/UlsApp/AsrSearch/towairSearch.jsp.

These rules "work[] as a safety mechanism to ensure that the FAA is made aware of Commission licensees' proposed tower projects which may [affect] air navigation." *Centel Cellular Co.*, 11 FCC Rcd 10800, 10816 (¶ 22) (1996). The

Commission "has always considered air navigation safety of the utmost importance" and has cautioned its licensees against "tak[ing] a cavalier attitude toward the very real hazard that their antenna towers cause to air safety." 11 FCC Rcd at 10808 (¶ 12).

II. FACTUAL BACKGROUND

A. Station KVEZ(FM)'s Operating Authority.

Appellant Eagle Broadcasting Group, Ltd. ("Eagle") was licensed to broadcast radio signals for station KVEZ(FM) from a site known as Black Peak in Arizona. *Commission's Order* ¶ 3 (JA 2). Due to interference from another site user, Eagle ceased broadcasting from the Black Peak site on June 23, 2001. On February 15, 2002, Eagle filed a modification application that proposed to relocate its broadcasting transmitter from the Black Peak site to a site in the Buckskin Mountains (the "Buckskin Application"). *Id.* ¶ 3 (JA 2). That site is within the glide slope of air traffic using the Avi Suquilla Airport in Parker, Arizona, the community that KVEZ(FM) was licensed to serve. *See id.* ¶ 12 & n.35 (JA 7); *see also* FCC TOWAIR system, *available at*, http://wireless2.fcc.gov/UlsApp/AsrSearch/towairSearch.jsp.

On April 24, 2002, the FCC's staff notified Eagle that processing of the Buckskin Application could not proceed because of a deficiency in the application: Eagle's response of "not applicable" to a question that asked for a Commission tower registration number – which an applicant receives after a determination from the FAA that the proposed broadcasting facility would not pose a hazard to air navigation – "was incorrect" because "public safety factors required both FAA

approval and Commission registration of the tower proposed in the Buckskin Application." *Commission's Order* ¶ 3 (JA 2).

Eagle "did not supply the required air safety information needed to complete the Buckskin Application." *Commission's Order* ¶ 4 (JA 3). Instead, on June 5, 2002, noting that the FCC's approval to operate the station at the Buckskin site "has not yet been received" and the "apparent deadline to be back on the air (June 23, 2002)," Eagle requested special temporary authority ("STA") to operate KVEZ(FM) from the station's studio in Parker, Arizona. *June 5, 2002 Letter from Maurice W. Coburn* (JA 145); *see also Commission's Order* ¶ 4 (JA 3). The staff granted the STA, and thus Eagle was authorized to operate station KVEZ(FM) with "a temporary, 20-foot tower to be erected adjacent to the studio building in downtown Parker" until December 19, 2002 (the "2002 STA"). *June 19, 2002 Letter from Edward P. De La Hunt* (JA 142). Thereafter, on July 10, 2002, Eagle notified the FCC that station KVEZ-FM had "recommenced its regular broadcast under the Special Temporary Authority granted by the Federal Communications Commission on June 19, 2002," and noted that "[a]s FCC files will indicate, KVEZ is awaiting approval of an alternate site, so that relocation construction can begin." *June 28, 2002 Letter from Maurice W. Coburn* (JA 141).

On December 31, 2002, Eagle notified the FCC that station KVEZ(FM) was silent as of noon on December 20, 2002, because Eagle had "turned off the power to our transmitter which has been broadcasting" in accordance with the 2002 STA, which had expired. *See December 20, 2002 Letter from Maurice W. Coburn* (JA 140). Eagle also stated that it was "going temporarily dark" because it was "in the

process of moving to our new transmitter site as previously approved by the F.C.C." and thus requested "permission to remain dark for 30 to 60 days while all necessary construction and installation are completed" "at the approved location." *Id.* (JA 140). In the same letter, Eagle represented to the Commission that the FAA had "finally give[n] its OK" for the new transmitter. *Id.* (JA 140); *see also Commission's Order* ¶ 4 (JA 3).

Notwithstanding those representations, the Commission had in fact not "approved" the Buckskin transmitter site or issued a registration number for it, and Eagle provided no confirmation of what it claimed was the FAA's "OK." Accordingly, in January 2003, the staff again asked Eagle to supplement the incomplete Buckskin Application. The staff specifically advised Eagle that action on the Buckskin Application would be withheld until Eagle responded and that Eagle's failure to respond "will result in the dismissal of the application pursuant to 47 C.F.R. § 73.3568(a)(1)."[4] *January 23, 2003 Letter from Rodolfo F. Bonacci* (JA 139); *see also Commission's Order* ¶ 4 (JA 3).[5]

Eagle ignored the deficiency notice for ten months. Then, on November 26, 2003, an Eagle consultant wrote to the Commission and stated that the FAA had

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[4] The Commission's rules provide that "[f]ailure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal." 47 C.F.R. § 73.3568(a)(1).

[5] On March 4, 2003, the FCC received a letter from Eagle that purportedly was "a report of our progress in moving KVEZ to its new approved site so that broadcasting can be resumed." *February 26, 2003 Letter from Maurice W. Coburn* (JA 137).

informed Eagle that "since the station antenna site was not within the flight path of the Parker area airport, and not of significant height to either be lighted or painted with the orange/white pattern, that no special authorization was required." *November 26, 2003 5:09 PM Electronic Message from Alpacas of Castle Rock* (JA 134-5); *see also Commission's Order* ¶ 5 (JA 3). In a reply message sent on December 9, 2003, the staff requested that Eagle's consultant submit a copy of the FAA's letter to verify that no FAA authorization was necessary, and also informed Eagle that, because station KVEZ(FM) had been silent since December 20, 2002, the "license is going to expire on 12/20/03." *See December 9, 2003 8:44 AM Electronic Message from Khoa Tran* (JA 134); *Commission's Order* ¶ 5 (JA 3). Commission staff also telephoned Eagle "to warn it of the impending expiration." *Commission's Order* ¶ 5 (JA 3).

The following day, the consultant replied that Eagle "[w]ill send a copy of the FAA information this week." *December 10, 2003 4:17 PM Electronic Message from Alpacas of Castle Rock* (JA 134); *Commission's Order* ¶ 5 (JA 3). With respect to the staff's warning of imminent license expiration pursuant to Section 312(g), the consultant advised that "KVEZ FM Parker, Arizona had returned to the air as of November 22, 2003" and he requested verification "that the Commission has received the appropriate notice so that the license will not expire on December 20." *Id.* (JA 134).

Despite its consultant's promise, Eagle *never* submitted the requested FAA letter or "any documentation establishing that it received FAA 'clearance,'" with respect to the Buckskin Application. *Commission's Order* ¶ 12 (JA 7). (On its

own, Commission staff in June 2004 contacted the FAA and was informed that the FAA "had no record of receiving any application or issuing any determination for the site specified in the Buckskin Application;" rather the FAA had only "provided an August 7, 2002 determination of no hazard to Eagle for a tower approximately 229 miles away from the Buckskin site." *Commission's Order* ¶ 12 & n.35 (JA 7).)

On December 3, 2003, Eagle notified the Commission that it had resumed the "regular broadcasting activities of KVEZ-FM in Parker, Arizona" and had "completed its installation of a new transmitter and antenna." *November 24, 2003 Letter from Maurice W. Coburn* (JA 136); *see also Commission's Order* ¶ 5 (JA 3). Eagle also advised the staff that station KVEZ(FM)'s return to the air occurred at the "'*previously approved site* North of the city of license, Parker, Arizona.'" *Commission's Order* ¶ 5 (JA 3) (*quoting November 24, 2003 Letter from Maurice W. Coburn* (JA 136)). The letter did not identify that site, but the Commission later discovered that it referred to the site proposed in the Buckskin Application that in fact had not been approved. *Commission's Order* ¶ 6 (JA 3).

In early January 2004, the staff received a complaint alleging that station KVEZ(FM) was causing broadcast interference and "was not operating from any site approved by the Commission." *Commission's Order* ¶ 5 (JA 3). Thereafter, on January 28, 2004, the staff contacted station KVEZ(FM) "for clarification of the 'previously approved' site from which Eagle was operating" as referenced in Eagle's November 24, 2003 letter (which was received by the Commission on December 3, 2003). *See Commission's Order* ¶ 6 (JA 3); *see also January 28,*

2004 9:32 AM Electronic Message from Glenn Greisman (JA 133). In response, Eagle's president and its consultant separately telephoned the staff to report that "the station was operating at the site proposed in its Buckskin Application." *Commission's Order* ¶ 6 (JA 3).

Thus, at the time station KVEZ(FM) resumed broadcasting, Eagle's Buckskin Application remained pending, and Eagle had not requested nor been granted any permanent or temporary authority to operate at variance with the operating authority Eagle held for its original Black Peak site. Nor had Eagle received FAA approval for operation of a broadcast tower at the Buckskin site it was using, and the tower thus remained a potential hazard to air safety.

B. Expiration of the Station KVEZ(FM) License.

On February 17, 2004, the staff notified Eagle that the pending Buckskin Application was dismissed as moot and the station's call letters deleted because the underlying license (for the Black Peak site) had expired as a matter of law under Section 312(g). *February 17, 2004 Letter from Peter H. Doyle* (JA 130-31) ("*Staff Decision*").

The staff explained that, as the provision read then, Section 312(g) did not provide the FCC "with any discretion and mandates that a station license automatically expire[s] as a matter of law if the station does not transmit broadcast signals for 12 consecutive months." *Id.* at 2 (footnote omitted) (JA 131). As Eagle had notified the FCC that station KVEZ(FM) had ceased broadcasting on December 20, 2002 – the day after the 2002 STA authorizing broadcasts from the station's studio at the Parker site had expired – to avoid license expiration under

Section 312(g), the station had until December 20, 2003, to resume broadcasting "either at their licensed sites or at variance with their license pursuant to special temporary authorization." *Staff Decision* at 2 (JA 131). Because station KVEZ(FM) had not resumed broadcasting at the Black Peak site specified in its license and had neither requested nor received an STA to broadcast at any other site on or before December 20, 2003, the staff concluded that the station KVEZ(FM) license expired as a matter of law "as of 12:01 a.m., December 21, 2003." *Id.* (JA 131). Citing previous staff rulings on the point,[6] the staff further explained that "[a] broadcaster cannot avoid the statutory deadline set forth in Section 312(g) by resuming operations, as here, without an authorization, permanent or temporary, from the Commission." *Id.* (JA 131).

Eagle petitioned the staff to reconsider its decision. *Petition for Reconsideration* (filed March 18, 2004) (the "*March Petition*") (JA 113). In light of Congress's amendment of Section 312(g) on December 8, 2004, Eagle filed a supplement to the *March Petition*, noting that the "statute, as amended, now directs the Commission to extend or reinstate broadcast licenses as appropriate 'to promote equity and fairness.'" *Supplement to Petition for Reconsideration* at 1

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[6] *Paul H. Brown, Esq.*, 18 FCC Rcd 2003 (Media Bureau 2003); *Idaho Broadcasting Consortium*, 16 FCC Rcd 1721 (Mass Media Bureau 2001).

(filed March 21, 2005) (JA 24).[7] The staff referred the *March Petition*, as supplemented, to the Commission for review. *Commission's Order* ¶ 1 n.1 (JA 1).

C. The Order on Appeal.

In its various filings challenging the staff determinations, Eagle argued that it had committed only the "'minor infraction of failing to use the words "Mother, may I"'" and that it was inappropriate to apply Section 312(g) to it for "'fail[ing] to phrase [its] communications with the FCC in the desired magic phrases.'" *Commission's Order* ¶¶ 8, 9 (JA 4-5). Notwithstanding these arguments, the Commission denied Eagle's petition for reconsideration challenging the staff's determination that Eagle's license had expired on December 21, 2003, and alternatively, asking the Commission to reinstate the license pursuant to the subsequent amendment of Section 312(g). *See Commission's Order* ¶ 1 (JA 1).

The Commission noted that Eagle had "trivialize[d] the need to receive Commission authorization prior to constructing and operating a broadcast station" and disagreed "with Eagle's initial contention that unauthorized transmissions are

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[7] Subsequent to the *Staff Decision* notifying Eagle that the station KVEZ(FM) had expired by operation of Section 312(g), Eagle filed various license renewal applications and STA requests in an effort to protect the license against expiration in the event that the Commission acted favorably on the *March Petition*. *See, e.g. January 18, 2005 Letter from Maurice W. Coburn* (requesting STA to operate station KVEZ(FM) from the Buckskin site for a brief period prior to February 23, 2005, which Eagle described as the "rapidly approaching anniversary date" of when the station "ceased broadcasting its signal" pursuant to the *Staff Decision*) (JA). The Commission denied or dismissed as moot Eagle's efforts to obtain operating authority after the KVEZ(FM) license expired. *See Commission's Order* ¶¶ 18, 22 (JA). Eagle has not challenged that portion of the *Commission's Order*.

sufficient to avoid the consequences of Section 312(g)." *Commission's Order* ¶ 9 (JA 5). Rather, the Commission read Section 312(g), in a manner that is consistent with the purpose of Section 301, which provides that "no person shall transmit radio signals except in accordance with authority granted by the Commission." *Id.* (JA 5). As the Commission explained, "if read to permit unauthorized operation to avoid license expiration, Section 312(g) would encourage violation of Section 301 and defeat its own purpose of ensuring timely construction and operation of authorized facilities that serve the public." *Id.* (JA 5).

The Commission also rejected Eagle's contention that its unauthorized transmissions from the Buckskin site "should not be viewed as unlawful because Eagle reasonably believed such transmissions were authorized," as well as its "attempt to shift responsibility for Eagle's mistaken beliefs or unlawful operations to the [FCC] staff." *Commission's Order* ¶¶ 11, 14 (JA 6, 8-9). As the Commission explained, "construction permits are written documents . . . [and the] Commission never issued, and therefore Eagle never received, a construction permit or any other document establishing that the Buckskin Application had been granted." *Id.* ¶ 13 (JA 7). To the contrary, the "staff advised Eagle in writing that the application could not be granted until Eagle supplied tower notification/registration information." *Id.* ¶ 13 (JA 7). Thus, the Commission concluded that "Eagle's claim that it held an authorization to operate at Buckskin is frivolous." *Id.* (JA 7).

In addition, the Commission noted that "it is a fundamental principle of the regulatory process that the Commission must routinely rely upon the

representations of its licensees and applicants." *Commission's Order* ¶ 14 (JA 8). In this case, the Commission found that Eagle had attempted to misuse that reliance by making a number of "misleading" and outright "false" statements to the Commission. *Id.* ¶ 26 (JA 14). In particular, it had provided the Commission with three separate accounts "regarding the issuance of an FAA air hazard determination": its 2002 statement that it had received "clearance" from the FAA for the Buckskin site; its subsequent statement that FAA approval was in fact not necessary; and its still later statement that it had "'obtained an FAA determination of no hazard to air navigation on August 7, 2003'" that it would send to the FCC. *Id.* ¶ 12 (JA 6-7). In fact, all of these representations were false: there was no FAA "clearance" for Buckskin; FAA approval was in fact necessary; and there was no August 7, 2003 FAA "determination" for the Buckskin site (so, not surprisingly, Eagle never followed through on its promise to forward that "determination" to the Commission). *Id.* (JA 6-7).

The Commission also rejected Eagle's alternative request for discretionary license reinstatement under amended Section 312(g). It found that Eagle had failed to meet "any of the statutory exceptions for reinstatement (*i.e.*, prevailing in an administrative or judicial appeal, changes in applicable law, or promotion of equity and fairness)." *Commission's Order* ¶ 26 (JA 14). As the Commission explained, Eagle offered no "credible basis" for reinstating the expired license under Section 312(g), particularly in light of "Eagle's misleading – and false – claim that it had resumed operations at an 'approved site.'" *Id.* ¶ 26 (JA 14). This appeal followed.

SUMMARY OF ARGUMENT

1. Section 312(g) of the Communications Act, which requires broadcasters to use their licenses to provide service to the public or have them automatically expire, is just one part of an intricate scheme of broadcast regulation. The core provision of that scheme is the prohibition in Section 301 of the Communications Act on broadcasting except in accordance with a Commission-issued license. Another portion of the statute requires the Commission to take steps to prevent broadcast towers from becoming "a menace to air navigation," a mandate with which the Commission has complied by requiring licensees to receive clearance from the Federal Aviation Administration before constructing a tower in the glide path of an airport. 47 U.S.C. § 303(q); 47 C.F.R. 17.1, *et seq.*

The Commission reasonably read these provisions in concert to mean that a licensee whose broadcast station had gone silent could not avoid the automatic, twelve-month cancellation provision of Section 312(g) by a last-minute resumption of transmission from an unauthorized location. To allow a licensee to save its license through such an action would reward it for violating Section 301 and ignoring its broadcast license. It would also encourage licensees to erect towers without the required FAA clearance, thus jeopardizing air navigation safety.

2. Eagle's claim that the order on review is arbitrarily inconsistent with past decisions suffers from threshold defects and, in any event, fails on the merits. First, with one exception, all the decisions on which Eagle relies were made by the Commission staff, not the Commission itself, and they therefore cannot be the basis for an APA inconsistency claim. *See Comcast Corp. v. FCC*, 526 F.3d 763,

769 (D.C. Cir. 2008). Second, a number of the orders, including the only Commission-level decision cited by Eagle, did not even mention Section 312(g), much less interpret it differently than the order on review. When the Commission's staff has had occasion to interpret Section 312(g) under circumstances like those presented here, it has done so in exactly the same way as the Commission did in this case, holding that only *authorized* resumption of broadcasting within the twelve-month period could avoid license termination.

3. The Commission's conclusion that there was no equitable basis for exercising its discretionary authority to reinstate Eagle's license was reasonable. The Commission properly rejected Eagle's attempt to avoid responsibility for its actions by claiming that it was "merely confused." Instead, the Commission found that Eagle had repeatedly made false statements to the agency on simple questions of fact not requiring sophistication or advice of counsel to answer. Eagle also "trivialized" its violation of the Act and Commission rules, including those intended to protect the safety of air traffic. Under these circumstances, there is no basis to challenge the Commission's conclusion that the equities did not favor reinstating Eagle's license.

ARGUMENT

I. STANDARD OF REVIEW

The Court must determine whether the Commission reasonably found that the license for station KVEZ(FM) expired as a matter of law under Section 312(g) of the Communications Act, and if so, whether the FCC's refusal to reinstate the expired license was an abuse of discretion.

With respect to the Section 312(g) determination, the Court must apply the standards articulated in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). The Court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If so, the "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Under those circumstances, "the task that confronts [the Court] is to decide, not whether the [agency's approach] represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mut. Ins. Co. v. IRS*, 118 S. Ct. 1413, 1418 (1998).

With respect to the Commission's refusal to reinstate the expired license, in order to prevail on review, Eagle must demonstrate that the challenged agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A). "Under this 'highly deferential' standard of review, the court presumes the validity of agency action . . . and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

II. THE COMMISSION'S INTERPRETATION OF SECTION 312(g) IS REASONABLE.

It is undisputed that station KVEZ(FM) ceased broadcasting on December 20, 2002, and that, to avoid license expiration under Section 312(g), it was required

to take action by December 20, 2003, the one year anniversary of the date the station went silent. *See, e.g.*, Br. at 12 ("Eagle had one year from December 20, 2002, to resume broadcasting to avoid license cancellation."). The only issue is whether its resumption of transmission at an unauthorized location and in violation of the Commission's and the FAA's air navigation safety rules was sufficient to avoid license termination. The Commission reasonably examined Section 312(g)'s place in the overall statutory design in answering that question in the negative. The Commission's reading (unlike Eagle's) also avoids creating a statutory incentive for illegal conduct and ensures proper protection for air navigation.

The "central requirement" of the Communications Act's broadcast licensing scheme is the requirement that broadcasting take place only in accordance with a Commission-issued broadcast license. *Ruggiero*, 317 F.3d at 245. Section 301 of the Act therefore bars "use or operat[ion] [of] any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." 47 U.S.C. § 301.

Among the core components of a broadcast license is the transmitter location. As the Commission has explained, it is particularly "concerned about the location of a broadcast station's transmitter tower to insure that the licensee provides the requisite technical service to its community of license, does not cause or receive objectionable interference to or from other broadcast stations, and conforms to FAA requirements regarding tower location, height and obstruction lighting." *Meredith Corp.*, 65 FCC 2d 182, 186-7 (¶ 13) (1977).

A proposed broadcast antenna at a location "that may interfere with the approach or departure space of a nearby airport runway" must notify the Federal Aviation Administration of the proposed construction; receive a written response from the FAA stating whether safety features such as special painting or lighting will be required; and register the tower with the Commission so that the agency can be assured that the licensee has complied with the requirement that it seek FAA review. *Commission's Order* n.11 (JA 2-3); *see generally* Part 17—Construction, Marking, and Lighting of Antenna Structures, 47 C.F.R. § 17.1, *et. seq*. This mandated process flows from the Commission's statutory obligation to mandate safety features for any broadcast antenna that could pose "a menace to air navigation." 47 U.S.C. § 303(q).

The Commission has appropriately interpreted Section 312(g) in the context of these related provisions. *See United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor," in which a statutory term should be read to have "a substantive effect that is compatible with the rest of the law"); *Pilon v. United States Dep't of Justice*, 73 F.3d 1111, 1122 (D.C. Cir. 1996) (statutory terms should be "considered in the context of [a statute's] general operation").

Section 312(g) specifies that if "a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary." 47 U.S.C. § 312(g). As the Commission has explained, a licensee that "fails to

transmit broadcast signals" cannot save its license by the last-minute initiation of unauthorized transmission in violation of Section 301. *Commission's Order* ¶¶ 2, 9 (JA 2, 5). If it could do so, "Section 312(g) would encourage violation of Section 301 and defeat its own purpose of ensuring timely construction and operation of authorized facilities that serve the public." *Id.* ¶ 9 (JA 5).

Eagle's core contention is that because "the Station did transmit broadcast signals from November 22, 2003, through December 20, 2003," it "was not 'silent' during that period in any sense of the term," thus rendering Section 312(g) inapplicable. Br. at 13. The Commission properly rejected such a narrow focus on mere transmission. Eagle's view – that *any* transmission, even one in blatant violation of a broadcast license, avoids cancellation – would subvert Section 301. *Commission Order* ¶ 9 (JA 5); *accord Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("Where, as here, we are charged with understanding the relationship between two different provisions within the same statute, we must analyze the language of each to make sense of the whole."). The Commission's interpretation, on the other hand, properly reads Section 312(g) against the back-drop of the statutory licensing scheme of which it is a part.

Eagle's interpretation of the statute would also lead to absurd results. Under Eagle's view of the statute, it could have resumed broadcast transmissions from an antenna in Maine or Minnesota or from any other unauthorized location of its choosing thousands of miles from its authorized tower on Black Peak and prevented expiration of its license. The Commission properly rejected a view of the statute that would lead to such unreasonable results.

Eagle's interpretation of Section 312(g) would also have significant deleterious consequences for aviation safety. It would provide an incentive for a broadcast station that has gone dark due to a problem with its authorized transmitter location to begin broadcasting from a new location without FAA clearance, no matter how grave a threat such a tower posed to aviation safety. Again, it was entirely reasonable for the Commission to read Section 312(g) in tandem with Section 303(q) and its air navigation rules to avoid such a result.

Although Eagle acknowledges that "the sparse legislative history of § 312(g) is not illuminating," Eagle nonetheless attempts to tease out support for its position from the conference report. Br. at 19. This effort fails. It is not surprising that Section 312(g) was part of a series of provisions titled "ELIMINATION OF UNNECESSARY COMMISSION REGULATIONS AND FUNCTIONS," given that the provision relieved the Commission of conducting lengthy revocation proceedings to revoke the licenses of stations that were not fulfilling their license obligations to broadcast. That remains true today. For instance, rather than being required to initiate proceedings to revoke Eagle's license because of its long period of silence, followed by unauthorized transmission (and other rule violations), the Commission was able to apply Section 312(g) to efficiently deem the license terminated.

In addition, Eagle's attempt to rely on the Commission's 1996 order implementing Section 312(g), *Silent Station Authorizations*, 11 FCC Rcd 16599, is misplaced. Br. at 20-21. That order simply updated the Commission's rules to reflect the enactment of the statutory provision; it did not purport to canvas every

issue that could be presented once the Commission began applying it. When the issue of a silent station's resumption of broadcasting through unauthorized facilities did arise in an individual adjudication, the Commission's staff, in 2001, gave the same answer that the Commission gave in Eagle's case: a "broadcaster cannot avoid the statutory deadline set forth in 47 U.S.C. § 312(g) when it resumes operations just prior to expiration of the one-year silent period only through use of substantially non-conforming facilities," without obtaining Commission authority to do so. *Idaho Broadcasting Consortium*, 16 FCC Rcd 1721, 1723 (Media Bureau 2001).

Eagle also quotes a portion of the *Silent Station Authorizations* order that said "'[t]he 1996 Act is clear that the relevant period of the silence is that of the *station*. The period is not based on any particular licensee or facility.'" Br. at 20 (quoting *Silent Station Authorizations*, 11 FCC Rcd at 16601 (¶ 6)). Eagle goes on to suggest that "[i]t is difficult to harmonize this language with the FCC's current position that the nature of the licensee's 'facilities' – whether authorized or unauthorized – is critical." Br. at 21. Critically, Eagle fails to quote the heading for this paragraph ("1996 Act's Effect on the Silent Station's Other FCC Transactions") or the sentence following the one it quotes: "Accordingly, the assignment or transfer of a broadcast license, the modification of the licensed facilities, special temporary authorizations to remain silent (STAs), and other such transactions will not toll or extend the 12-month period, notwithstanding any provision in any authorization to the contrary." *Silent Station Authorizations*, 11 FCC Rcd at 16601 (¶ 6). The Commission there was stressing the mandatory

nature of Section 312(g) and making clear that *even Commission-approved actions*, *e.g.*, "FCC Transactions" such as license transfers or special temporary authorizations to remain silent, would not stop the statute's 12-month clock. If even Commission-authorized actions could not stop license expiration under Section 312(g), no reasonable licensee would have read the *Silent Station Authorizations* order to mean that *un*authorized actions could do so.

III. EAGLE'S INCONSISTENCY CLAIM FAILS

Eagle also contends that the Commission has failed "to treat like cases alike" because, according to Eagle, the agency has not applied Section 312(g) to licensees similarly situated to Eagle but has instead imposed forfeitures or used other remedial tools. Br. at 22-27. This argument suffers from threshold defects and, in any event, fails on the merits.

As an initial matter, five of the six decisions Eagle cites were made by Commission staff, not the full Commission.[8] As this Court recently reaffirmed, they therefore provide no basis for an APA inconsistency claim. *Comcast Corp.*, 526 F.3d at 770 ("[U]nchallenged staff decisions are not Commission precedent, and agency actions contrary to those decisions cannot be deemed arbitrary and capricious.").

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[8] *See Frank Rackley, Jr.*, 23 FCC Rcd 6898 (2008) (decision of Regional Director, South Central Region, Enforcement Bureau); *South Seas Broadcasting, Inc.*, 23 FCC Rcd 6474 (2008) (decision of Chief, Media Bureau); *Morgan County Industries, Inc.*, 21 FCC Rcd 13712 (2006) (same); *M.C. Allen Productions*, 16 FCC Rcd 21138 (2001) (decision of Chief, Enforcement Bureau); *WRHC Broadcasting Corp.*, 16 FCC Rcd 10059 (2000) (same)

Four of the decisions, including the only one made by the full Commission, also suffer from an independent threshold defect: they do not even cite Section 312(g), much less hold that it was inapplicable in the presented circumstances. *See Commission's Order* ¶ 10 (JA 6) ("Eagle's reliance on cases which do not involve Section 312(g) is misplaced.").[9] As a logical matter, the order on review's explicit analysis of the meaning of Section 312(g) cannot be inconsistent with past orders that did not even address that provision's scope or applicability. Eagle contends that these orders "*sub silentio* adopted Eagle's position here," Br. at 25, but the Supreme Court has squarely rejected that mode of analysis. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 516 (1984) (rejecting "attempt to infer from . . . silence" in past regulatory pronouncement "the existence of a contrary policy").

Even putting these defects aside, Eagle's reliance on these decisions would fail. For example, *South Seas Broadcasting*, which Eagle claims (Br. at 23) is inconsistent with the order on review here, actually adopts precisely the same reading of Section 312(g). In that case, the station ceased broadcasting on May 4, 1999, but resumed broadcasting from a different antenna on April 27, 2000. 23 FCC Rcd at 6475 (¶ 3). Commission staff originally notified the broadcaster that its license had expired pursuant to Section 312(g) because it "had not demonstrated that the Station had returned to the air with *authorized facilities* between May 4, 1999, and May 5, 2000." *Id.* at 6476-77 (¶ 6) (emphasis added).

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[9] These decisions are: *Maria L. Salazar*, 19 FCC Rcd 5050 (2004) (Commission-level decision); *M.C. Allen Productions; WRHC Broadcasting Corp.*; *Frank Rackley, Jr.*

In response to the staff's notification, however, the broadcaster "provided conclusive proof" that the "[s]tation resumed operation on April 27, 2000, before the twelve-month period expired" "with an emergency antenna *authorized* by Section 73.1680 of the [Commission's] Rules." 23 FCC Rcd at 6477 & n.26 (¶¶ 6-7) (emphasis added). Thus, "the staff found that the station had not been silent for twelve consecutive months [and] reinstated the station's license." *Id.* (¶ 7).[10] At the same time, the staff order offered precisely the same interpretation of Section 312(g) as the Commission did in this case: "a broadcast station cannot preserve its license by resuming operation with unauthorized facilities." *Id.* at 6476 n.19.

Other decisions Eagle cites are simply inapposite. For example, while *Maria L. Salazar, Frank Rackley, Jr., M.C. Allen Productions,* and *WRHC Broadcasting* all involved some form of unauthorized transmission, none of them addressed stations that had gone dark and then *resumed* broadcasting with unauthorized facilities. In fact, in *Maria L. Salazar*, the only Commission-level decision Eagle cites, the licensee was simultaneously broadcasting from its authorized location and its unauthorized one, so there was no period of time in which there was only unauthorized transmission. *See Maria L. Salazar*, Notice of Apparent Liability, 17 FCC Rcd 14090 (¶¶ 2-3) (2002). The fact pattern presented by this case – silence followed by transmission from an unauthorized location just

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[10] There were two other instances in *South Seas Broadcasting* in which the broadcaster resumed operations nearly twelve months after it had been off the air. In each of those instances, the staff was careful to note that before the licensee resumed broadcasting, it had obtained an STA which authorized it to do so. 23 FCC Rcd at 6476 (¶ 5), 6478 (¶ 9).

before expiration of the 12-month 312(g) period – is simply not present in the decisions upon which Eagle relies.

Finally, Eagle's attempt to use staff decisions in its favor is selective. It ignores completely previous staff rulings that address the question actually presented by this case and construe Section 312(g) just as the Commission did here. For example, in *Paul H. Brown, Esq.* the staff found that a license had automatically expired under Section 312(g), notwithstanding the licensee's unauthorized resumption of broadcasting just before the deadline. 18 FCC Rcd 3818, 3819-20 (Media Bureau 2003), *aff'd sub. nom, A-O Broadcasting Corp.*, 23 FCC Rcd 603 (2008) ("[T]he permittee's November 5, 2002, operations were not authorized broadcasts, and thus, do not represent a 'break' in the station's silence."). Likewise, in *Idaho Broadcasting Consortium*, Commission staff found that a broadcaster that "ended its . . . almost year-long period of silence only by resuming broadcast operations . . . with unauthorized facilities, that were at substantial variance from its permit and for which no operating authority had been sought or given" could not "avoid the statutory deadline set forth in 47 U.S.C. § 312(g)." 16 FCC Rcd at 1723. The staff went on to explain that "[t]o conclude otherwise would elevate the broadcaster's need to avoid the strictures of § 312(g) over its obligation to adhere to other statutory provisions that ensure a technically sound broadcast service." *Id.*

Not only do these decisions (and *South Seas Broadcasting*) demonstrate the consistency between the Commission's analysis of Section 312(g) and that conducted by the staff in prior cases, but they also defeat Eagle's cursory argument

(Br. at 26-27) that it did not have "sufficient notice" that its actions could subject it to Section 312(g). *See Star Wireless, LLC v. FCC*, 522 F.3d 469, 474 (D.C. Cir. 2008) (staff decisions on point sufficient to defeat fair notice claims).

IV. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY REFUSING TO REINSTATE EAGLE'S LICENSE

As Eagle correctly points out, Section 312(g), as amended, does not mandate license reinstatement but instead vests the Commission with discretion to reinstate a license that has expired under this provision if doing so would, among other things, "promote equity and fairness." *See* Br. at 27. Eagle insists that "the equities were overwhelmingly in favor of reinstatement" in this case, Br. at 28, but quite the opposite was the case.

In denying Eagle's request for equitable reinstatement of its license, the Commission reasonably rejected Eagle's claim that it had been "'merely confused' about the status of its permit" to transmit from the Buckskin site. *Commission's Order* ¶ 26 (JA 14). Instead, the Commission noted that the staff had explicitly warned Eagle about the impending Section 312(g) deadline and had gone out of its way to ask Eagle to perfect its incomplete Buckskin application. *See id.* (JA 14). As the Commission explained, "Commission construction permits are written documents," *id.* ¶ 13 (JA 7), and Eagle never received one for the Buckskin site. There is nothing confusing about that state of affairs; Eagle's failure to receive such a permit meant that it was not supposed to erect an antenna at that site.

Moreover, the equities disfavored discretionary relief for Eagle because it had made repeated "misleading – and false – claim[s]" to the Commission.

Commission's Order ¶ 26 (JA 14). In 2002, it told the Commission that it had "clearance" from the FAA for the Buckskin site, but that was not true. It later advised the Commission that FAA approval was not actually necessary, but it was (as anyone typing the Buckskin site's proper coordinates into the TOWAIR system on the Internet would have discovered). Still later, Eagle claimed that it had "'obtained an FAA determination of no hazard to air navigation on August 7, 2003'" and promised to send a copy to the FCC. Eagle never sent the "determination" because it did not exist. *See id.* ¶ 12 (JA 6-7).

Eagle's brief offers no explanation for its false statements. Instead, it attempts to sweep them away as merely "a failure to communicate," resulting "in great part from Eagle's lack of counsel and the fact that the parties never met in person, but rather communicated – or failed to communicate – by email, telephone or facsimile." Br. at 29-30. The Commission "must routinely rely upon the representations of its licensees and applicants," *Commission's Order* ¶ 14 (JA 8), and the fact that those representations are typically not made "in person" does not absolve the licensee of the obligation to tell the truth. Likewise, it does not require legal counsel or any level of sophistication to avoid making false statements on simple matters of fact (such as whether or not there existed an FAA clearance letter that would be forwarded to the Commission later in the week).

Finally, it is relevant to the equities of its case that Eagle sought to "trivialize[]" its violations of Section 301 and the air navigation safety rules, calling them "minor infraction[s] of failing to use the words 'Mother may I.'" *Commission's Order* ¶ 9 (JA 5). The Commission does not view violations of

these rules as "minor" and has expressly warned licensees not to "take a cavalier attitude toward the very real hazard their antenna towers cause to air safety." *Centel Cellular Co.*, 11 FCC Rcd at 10808 (¶ 12).

CONCLUSION

For the reasons above, the *Commission's Order* should be affirmed.

Respectfully submitted,

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October 10, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EAGLE BROADCASTING GROUP, LTD.,	)	
	)	
APPELLANT,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	NO. 08-1066
	)	
APPELLEE.	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 7742 words.

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November 13, 2008

STATUTORY APPENDIX

47 U.S.C. § 153(6)

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

(6) Broadcasting

The term "broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

47 U.S.C. § 303(q)

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

47 U.S.C. § 312(g) (1996)

§ 312. **Administrative sanctions**

(g) Limitation on silent station authorizations

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

47 U.S.C. § 312(g) (2004)

§ 312. Administrative sanctions

(g) Limitation on silent station authorizations

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness. Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

47 C.F.R. § 17.1

§ 17.1 Basis and purpose.

(a) The rules in this part are issued pursuant to the authority contained in Title III of the Communications Act of 1934, as amended, which vest authority in the Federal Communications Commission to issue licenses to radio stations when it is found that the public interest, convenience, and necessity would be served thereby, and to require the painting, and/or illumination of antenna structures if and when in its judgment such structures constitute, or there is reasonable possibility that they may constitute, a menace to air navigation.

(b) The purpose of this part is to prescribe certain procedures for antenna structure registration and standards with respect to the Commission's consideration of proposed antenna structures which will serve as a guide to antenna structure owners. The standards are referenced from two Federal Aviation Administration (FAA) Advisory Circulars.

IN THE UNITED STATES COURT OF APPEALS
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Eagle Broadcasting Group, LTD., Appellant,

v.

Federal Communications Commission, Appellee.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Appellee" was served this 13th day of November, 2008, by mailing a true copy thereof, postage prepaid, to the following person at the address listed below:

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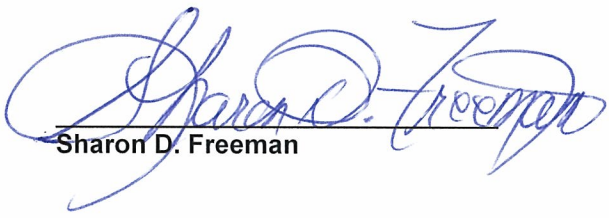

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